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May 17, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals, TW-A325
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Comments of Time Warner Telecom in response to
GTE Petition for Declaratory Ruling, CC Docket No. 99-143

Dear Ms. Salas:

Enclosed please find an original and seven copies of the comments of Time Warner Telecom in the above-referenced proceeding. An electronic and paper copy is also being filed with ITS.

Sincerely,

A. Renée Callahan

Enclosures

cc: Attached service list

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.

| | | |
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| In the Matter of | ) | |
| | ) | |
| GTE's Request for Declaratory Ruling | ) | CC Docket No. 99-143 |
| Regarding the Use of Section 252(i) | ) | |
| To Opt Into Provisions Containing | ) | |
| Non-Cost-Based Rates | ) | |

**COMMENTS OF TIME WARNER TELECOM**

Time Warner Telecom Holdings Inc. ("TWTC"), by its attorneys, hereby files its comments opposing the petition of GTE Service Corporation and its affiliated domestic telephone operating companies (collectively, "GTE") for a declaratory ruling that telecommunications carriers be prohibited from exercising their rights to opt into provisions of interconnection agreements under Section 252(i) where the cost or rate element of that provision is (ostensibly) not cost-based. The legal basis offered by GTE for requesting such relief is fatally flawed and the petition must be rejected for the reasons discussed below.

**INTRODUCTION AND SUMMARY**

GTE's petition is a thinly veiled attempt to take another stab at issues already resolved by or currently under consideration by the Commission in other dockets. Importantly, GTE does not -- because it cannot -- argue that Section 252(i)'s language on its face excludes non-cost-based rates. Instead, GTE rather inartfully tries to read such a limitation into Section 51.809 of the Commission's rules. But Section 51.809 addresses

only a change in the costs faced by the incumbent local exchange carrier ("ILEC"). The provision does not apply where, as here, the ILEC alleges that the costs incurred by a competitive local exchange carrier ("CLEC") seeking to opt into an agreement are lower than those of the CLEC that originally signed the agreement.

GTE offers two examples of what it claims are non-cost-based rates. It is here that GTE's true motive is revealed: both examples, not surprisingly, involve provisions that set compensation rates for traffic bound for Internet Service Providers ("ISPs").[1] Even if one assumes that GTE is correct that these rates are not cost-based, nothing in the Act or the Commission's regulations relieves GTE of its obligation to make those rates available to requesting carriers under Section 252(i). Accordingly, the Commission need not address GTE's specific examples because its basis for excluding them from the Section 252(i) process is utterly meritless.

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[1] GTE's claim that it has filed this petition to *avoid* duplicative proceedings is particularly ironic. GTE's petition largely reiterates positions it has taken in existing or past proceedings, and thus, in reality, *creates* duplicative proceedings. Indeed, GTE lifted its arguments regarding the propriety of using reciprocal compensation rates as a proxy for inter-carrier compensation for ISP-bound traffic almost verbatim from its response to the Commission's proposed rulemaking in CC Docket 99-68. Compare GTE Comments at 6-8, Inter-Carrier Compensation for ISP-Bound Traffic, CC Dkt. 99-68 (filed Apr. 12, 1999) ("GTE NPRM Comments") (discussing inadequacy of local service rates and new SS7 bypass devices), with GTE Petition at 5 (local service rates), and 8 (SS7 bypass).

## I. NEITHER THE ACT NOR THE COMMISSION'S IMPLEMENTING REGULATIONS EXCLUDES NON-COST-BASED RATES FROM AN ILEC'S OBLIGATIONS UNDER SECTION 252(i).

GTE's sole legal argument in support of its petition is that Section 252(i), as interpreted by the Commission, does not require ILECs to make available provisions of interconnection agreements that are no longer cost-based. See, e.g., GTE Petition at i, 1-2, 4-5. Contrary to GTE's claims, neither the Act nor the Commission's rules limits Section 252(i) in such a manner.

The plain language of Section 252(i) requires ILECs to "make available *any* interconnection, service, or network element provided under an [interconnection] agreement." 47 U.S.C. § 252(i) (emphasis added). There is no exception for non-cost-based rates. Moreover, the Act expressly allows ILECs to enter into agreements without regard to Section 252(d)'s pricing standards. Id. § 252(a)(1). As a result, an ILEC's duty under Section 252(i) clearly requires it to make available both arbitrated and negotiated terms, in spite of the fact that the latter need not be cost-based.

GTE's reliance on Section 51.809 is similarly misplaced. That section provides, in relevant part:

> The obligations of [an ILEC under Section 252(i)] shall not apply where the incumbent LEC proves to the state commission that: (1) The costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement.

47 C.F.R. § 51.809(b). An example of how Section 252(i) operates illuminates the effect of this section. Section 252(i) allows a requesting telecommunications carrier, Carrier B, to elect a price provision for a particular service from GTE's interconnection agreement with another carrier, Carrier A. Section 51.809 provides that, where GTE can prove to the state commission that GTE's costs of providing the service to Carrier B are greater than GTE's costs of providing the same service to Carrier A, then Section 51.809 relieves GTE of its duty to make that provision available to Carrier B.

Section 51.809 does not apply in the instant case. Even assuming *arguendo* that GTE is correct that rates in existing interconnection agreements for ISP-bound traffic are no longer cost-based, Section 51.809 applies only when the *ILEC's costs* of providing a service (in this case, the delivery of ISP-bound traffic) differ between carriers (*i.e.*, between Carrier A and B), not when the *CLEC's costs* change. GTE has made no attempt to demonstrate that its costs are higher in one case than in another, and this showing must, in any event, be made in the first instance to the relevant state commission. Thus, Section 51.809 is inapplicable. GTE's duty to make available *any* interconnection, service or network element provision to requesting carriers remains unlimited.

## II. GTE FAILS TO SUPPORT ITS CLAIM THAT COMPENSATION RATES FOR ISP-BOUND TRAFFIC ARE NO LONGER COST-BASED.

GTE devotes a substantial portion of its petition to discussing what it claims are two instances in which rates are non-cost-based. However, even if Sections 252(i) and 51.809 did prohibit CLECs from opting into non-cost-based provisions (which they do not), GTE's factual premise -- that rates for ISP-bound traffic are non-cost-based -- is incorrect and unsupported.

### A. Inter-Carrier Compensation for ISP-Bound Traffic

GTE claims that the Commission and several states have recognized that existing inter-carrier compensation rates for ISP-bound traffic are not cost-based. GTE Petition at 5-7. In support of this contention, GTE offers up two anomalous examples, one of which apparently involved an ISP that had been certified as a CLEC in order to collect compensation for terminating calls to itself, and the other of which apparently involved "hubbing arrangements for the purpose of collecting reciprocal compensation." Id. at 7. GTE is correct that the Commission recognized that problems may exist in such circumstances, where CLECs have been "established solely (or predominately) for the purpose of delivering traffic to ISPs."[2] Regardless, the fact that a handful of fringe carriers may attempt to abuse a regulatory scheme does not undermine the efficacy of that scheme.

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[2] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Dkt. No. 96-98 and Notice of Proposed Rulemaking in CC Dkt. No. 99-68, ¶ 24 & n.78 (Feb. 26, 1999) ("Declaratory Ruling").

Moreover, GTE blithely ignores the fact that the Commission, having recognized the problem, also resolved it. In its Declaratory Ruling, the Commission expressly deferred the issue to state commissions, which it held "are capable of assessing whether and to what extent these and other anomalous practices are inconsistent with the statutory scheme (*e.g.*, definition of a carrier) and thereby outside of the scope of any determination regarding inter-carrier compensation." Declaratory Ruling ¶ 24 n.78. Indeed, the example that GTE cites from Texas indicates that the hearing examiner was able to discern that "CT Cube the ISP" performed no switching and thus was apparently not entitled to compensation. GTE Petition at 6. Similarly, the Massachusetts commission is also investigating the alleged "hubbing arrangements" to determine whether the carriers involved are legitimate. Id. at 7. GTE's own petition thus demonstrates that the FCC's belief that the state commissions were capable of handling such issues was well warranted. The Commission should not disturb that decision here.

**B. Reciprocal Compensation Rates for Tandem Switching**

The second category of non-cost-based rates discussed by GTE involves reciprocal compensation arrangements based on tandem switching rates. GTE contends that CLECs who do not use tandem switches to transport or deliver traffic should not be allowed to opt into provisions based upon those switching rates. Id. at 8. GTE complains that many CLECs do not employ traditional end-office/tandem architecture, choosing instead to deploy more

advanced technologies that allow them to avoid circuit-switching on selected calls, including, in some instances, ISP-bound traffic. Id. Because these new technologies permit direct transport of telephone calls to ISPs, GTE avers that they result in CLECs being compensated for functions they are not performing, thus resulting in non-cost-based rates. Id. at 8-9.

While GTE's example in fact appears geared toward undermining reciprocal compensation rates as proxies for inter-carrier compensation for ISP-bound calls, its claims are characterized much more broadly. To the extent that its argument relates to non-ISP-bound local traffic under Section 251(b)(5), GTE's attack on a CLEC's ability to opt into symmetrical rates constitutes a restatement of assertions considered and rejected by the FCC in the Local Competition docket. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd. 15499 (1996) ("Local Competition Order").

In that docket, GTE made a virtually identical argument, "contend[ing] that the symmetry rule violates the requirement of section 252(d)(2) that rates be based on a reasonable estimate of the additional costs of transport and termination." Id. ¶ 1072. The Commission rejected GTE's and other ILECs' arguments, holding that:

> We . . . conclude that using the incumbent LEC's forward-looking costs for transport and termination of traffic as a proxy for the costs incurred by interconnecting carrier satisfies the requirement of Section 252(d)(2) that costs be determined "on the basis of a reasonable approximation of the additional

> costs of terminating such calls." Using the incumbent LEC's cost studies as proxies for reciprocal compensation is consistent with section 252(d)(2)(B)(ii), which prohibits "establishing with particularity the additional costs of transporting or terminating calls."

Id. ¶ 1085 (citing 47 U.S.C. § 252(d)(2)(B)(ii)).

The Commission also considered GTE's argument here that rates should be asymmetrical where traffic is routed through tandem switches, as well as countervailing claims that adoption of asymmetrical rates would penalize new entrants that might deploy newer, more efficient architectures. Id. ¶¶ 1079, 1090. While the Commission directed state commissions to establish presumptively symmetrical rates, it also indicated that, where the CLEC's technology "perform[ed] functions similar to those performed by an incumbent LEC's tandem" and "serve[d] a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the [CLEC's] additional costs is the LEC tandem interconnection rate." Id. ¶ 1090. GTE's petition thus asks the Commission impermissibly to change established law without offering any new evidence as to why such a change is required.[3]

To the extent that GTE's attack focuses on the propriety of using reciprocal compensation rates as a proxy for the costs of

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[3] It should be emphasized that, if GTE is correct that in some cases a CLEC's technology does not perform the same functions as the ILEC's tandem, then the Commission's rules require GTE to present that evidence to the state commissions, not the FCC.

exchanging ISP-bound traffic, those issues have already been fully briefed by the parties, including GTE, in CC Docket 99-68.[4] Even if that were not the case, the Commission's policy reasons for presuming that reciprocal compensation rates should be symmetrical, as outlined in the Local Competition Order, are equally applicable here, and dictate that newer technologies should be treated the same as older configurations regardless of the type of traffic being carried.

**CONCLUSION**

For the reasons described above, the Commission should deny GTE's petition.

Respectfully submitted,

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May 17, 1999

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[4] See GTE NPRM Comments at 6-8 (repeating verbatim allegations that CLECs avoid costs of circuit switching through SS7 bypass devices); see also Declaratory Ruling ¶ 35.

## CERTIFICATE OF SERVICE

I, Trisha McLean, do hereby certify that on this 17th day of May 1999, copies of the attached Comments of Time Warner Telecom were served by first class mail, postage prepaid, or hand delivered as indicated, on the following parties:

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